Supreme Court, U.S.
FILED
DEC 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-632

In the Supreme Court of the United States

OCTOBER TERM, 1986

HERMAN E. MCMAHAN AND CHARLES D. PRICE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a conviction for mail fraud under 18 U.S.C. 1341 requires proof of economic harm to the victim of the fraud.

2. Whether the court of appeals, having ruled that petitioners' misuse of labor union application forms did not constitute embezzlement within the meaning of 29 U.S.C. 501(c), should have reversed petitioners' mail fraud convictions, which were based on petitioners' abuse of their fiduciary duties as elected labor union officials.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 19-34) is reported at 788 F.2d 234.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1986. Petitions for rehearing filed by petitioners and by the government were denied on August 20, 1986. The petition for a writ of certiorari was filed on October 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted on one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371, and on several counts of mail fraud, in violation of 18 U.S.C. 1341, and embezzle-

ment of union property, in violation of 29 U.S.C. 501(c). Petitioners were sentenced to concurrent terms of one year's imprisonment on all counts.

1. At trial, the government established that petitioners, in their capacity as elected officials of local chapters of the International Iron Workers' Union, exacted payments from applicants for union membership in excess of the union membership fees and dues and kept the excess monies they received (Pet. App. 21-23). Applicants for union membership would provide petitioner Price with blank money orders for payment of the fees. Price would then recommend the applicants to petitioner McMahan for membership in McMahan's local chapter (*id.* at 22). McMahan would approve the applications and fill in the money orders in amounts that exceeded the union's membership fees and dues (*ibid.*). Petitioners and their coconspirators would then retain the overpayments for their personal use (*ibid.*). Petitioners also prepared or caused the preparation of membership applications on union application forms, often including information that was untrue. Petitioners then caused the application forms to be mailed to the union (*id.* at 23). Petitioners' recruitment efforts increased the membership of petitioner McMahan's local union chapter and, as a result, had the incidental benefit of improving the financial condition of the chapter (*id.* at 20).

2. On appeal, the court of appeals rejected (Pet. App. 25-28) petitioners' claim that their mail fraud convictions—which were based on the mailing of the application forms—must be reversed because the government had failed to prove a financial loss to the union. According to the court, the loss of intangible rights was a sufficient basis for a mail fraud conviction. It was enough, the court observed, that "the union and its members were not re-

ceiving what they were entitled to, that is the honest and faithful services of their officials in the exercise of their official duties" (*id.* at 27-28).

The court of appeals agreed, however, with petitioners that their convictions on multiple counts of embezzling union property in violation of 29 U.S.C. 501(c)—based on their misuse of the union applications forms—should be reversed (Pet. App. 29-34). The court concluded that no union property had been embezzled because the application forms had been used for their intended purpose, and because the union had in each instance received the amount of membership fees and union dues that it had requested (*id.* at 31-34).[1]

DISCUSSION

1. Petitioners raise (Pet. 13-17) the question whether the convictions of union officials for mail fraud under 18 U.S.C. 1341 requires proof of economic harm or whether, as the court of appeals held, the convictions may be based on the loss of "intangible rights"—in this case, the deprivation of petitioners' faithful and honest services in their capacity as elected union officials. This Court recently granted certiorari in a case that raises an issue similar to the one raised in this case. See *McNally* v. *United States,* No. 86-234 (consolidated with *Gray* v. *United States,* No. 86-286). The *McNally* case arises from the prosecution of two individuals who participated in a kickback scheme in-

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[1] The court of appeals' opinion states that "[a]s part a of the membership process, the applicant filled out a * * * membership application" (Pet. App. 30) and "[t]here was no evidence that the forms were altered or falsified in any manner" (*id.* at 31). In its petition for rehearing, the government brought to the court of appeals' attention the evidence before the jury that the applicants had not completed their own forms, and that virtually all the forms contained false information. See Gov't Pet. for Reh'g 4-5.

volving a public official and a political party leader. The fraud alleged in *McNally,* like the fraud alleged in this case, was based on the deprivation of the victims' rights to the defendants' performance of their fiduciary obligations. Because the Court's decision in the *McNally* case may bear on the issue presented in this case, we submit that the Court should hold the petition in this case pending its disposition of the *McNally* case.

2. Petitioners also claim (Pet. 7-12) that this Court's decision in *Yates* v. *United States,* 354 U.S. 298 (1957), requires reversal of their mail fraud convictions. Petitioners contend that the court of appeals was correct in ruling that their conduct did not violate 29 U.S.C. 501(c), but that the flaw in the Section 501(c) counts tainted the mail fraud counts because the jury may have relied on the illegality of their conduct under Section 501(c) as a basis for convicting them on the mail fraud counts. Petitioners' reliance on *Yates* is misplaced. In *Yates* the Court could not determine whether the jury had based its conspiracy conviction on conduct that was not in fact illegal. In this case, by contrast, there is no such ambiguity.

Unlike in *Yates* and the court of appeals' decisions on which petitioners rely, the jury in this case did not have before it an alternative theory of prosecution under which the jury's verdict would have been invalid. The embezzlement counts that the court of appeals reversed depended on the misuse—in effect, the theft—of union *property.* The mail fraud counts were not based on a theft of property theory, but were based on petitioners' failure to provide the union their loyal, faithful and honest services in their capacities as elected union officials. The jury instructions made that distinction clear to the jury. Hence, there is no basis for concern that the jury may have relied on an

improper embezzlement theory in convicting petitioners of mail fraud.[2]

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[2] The district court charge to the jury regarding the mail fraud counts provided, in pertinent part (Tr. 1609-1610):

> I'd like to explain to you the scheme that the government contends is involved in this matter.
>
> In many instances the scheme alleged in a criminal prosecution for mail fraud involves a scheme to defraud someone of property or money. That, however, is not the case here. This scheme is not a scheme to defraud [the] union * * * or anybody else of money. In addition to covering a scheme that would charge someone of defrauding someone of money or property, the mail fraud statute also prohibits schemes to defraud individuals of what we will refer to as intangible interests or rights, and the schemes charged in this indictment fall within that category.
>
> The intangible rights that the government in this case alleges, the scheme in question, involved, are the rights of [the union] to have the loyal, faithful and honest performance of services by its elected official, the defendant, Herman E. McMahan, its business agent and financial secretary.
>
> This is not a scheme, according to the allegations of the indictment, and that's the only crime charged, to take union money or to take union property. The allegations of the indictment charge these defendants with mail fraud in devising and participating in, and using the mail in furtherance thereof, a scheme to deprive [the local union chapter] of the loyal, faithful and honest service of its elected business agent and financial secretary.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *McNally* v. *United States,* No. 86-234, and *Gray* v. *United States,* No. 86-286.

Respectfully submitted.

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DECEMBER 1986

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40156